STATE OF MICHIGAN

COURT OF APPEALS

ERIK S. GILLESPIE,

Plaintiff,

and

ROBERT W. GILLESPIE and SHARON G. GILLESPIE,

Intervening Plaintiffs-Appellants,

v

CORA LYNN HOLTZ,

Defendant-Appellee.

UNPUBLISHED
August 10, 1999

No. 213189
Macomb Circuit Court
LC No. 91-000020 DM

Before: Collins, P.J., and Jansen and White, JJ.

PER CURIAM.

This is a child custody action. Intervening plaintiffs are the paternal grandparents of Amber Christine Gillespie (born February 12, 1989) and Samantha Nicole Gillespie (born April 23, 1990). Intervening plaintiffs appeal as of right from a June 25, 1998 order granting physical custody of the children to their mother, Cora Lynn Holtz. The grandparents have had legal and physical custody of the children since 1994, however, they have had physical custody of the children since the time that the father removed them from the marital home in November 1990. The trial court awarded physical custody to the mother. We affirm and remand.

We are once again faced with protracted custody proceedings. Erik Gillespie and Cora Holtz were married on September 17, 1988. They had two children together and in November 1990, the father moved out of the marital home and took the children with him. Erik first lived with his sister, and then moved into the home his parents. On November 15, 1990, Erik filed a petition in the Macomb Probate Court (Judge James F. Nowicki) requesting that the paternal grandfather be appointed a limited guardian. The probate court granted the petition, although defendant did not consent to the petition and

did not sign it. Defendant subsequently objected to the guardianship proceeding, and a hearing was held on November 28, 1990. The probate court did not grant defendant's request to have the children returned to her and the parties then agreed to continue the status quo on a temporary basis.

In January 1991, Erik filed a complaint for divorce. On May 14, 1991, the trial court (Judge Michael D. Schwartz) entered an ex parte interim order granting temporary custody to the grandparents. On August 29, 1991, the trial court entered a default judgment of divorce. The grandparents were awarded temporary custody as part of the default judgment until further order of the court, and the issue of child custody was referred to the Macomb County Friend of the Court for investigation and recommendation. On April 6, 1992, the trial court entered a child support order where Erik and defendant were to pay child support to the grandparents, retroactive to August 29, 1991. A Friend of the Court report was later issued in May 1992. The investigator recommended that the grandparents have physical custody and that the grandparents and defendant have joint legal custody. The investigator also recommended that defendant have reasonable and liberal visitation. On June 4, 1992, the trial court signed an interim order granting visitation to defendant and further ordering that an evidentiary hearing to determine the issues of custody, visitation, and support be scheduled. The Friend of the Court's report and recommendation was not filed until July 14, 1993. The referee recommended that custody remain with the grandparents. Defendant immediately filed objections and requested a de novo hearing before the circuit court.

On August 23, 1993, the trial court granted the motion for a de novo hearing. In an opinion and order dated February 22, 1994, the trial court rejected defendant's claim that the grandparents lacked standing to seek permanent custody. The grandparents were consequently added as party plaintiffs to the custody action. Hearings were conducted on December 14, 1993, February 22, 1994, March 8, 1994, March 21, 1994, and May 2, 1994. In an opinion and order dated July 27, 1994, the trial court granted permanent physical custody to the grandparents, granted reasonable visitation to defendant, and ordered that support be continued as previously ordered. In a supplemental opinion and order dated August 26, 1994, the trial court awarded the grandparents sole legal custody and denied defendant's request to restore her maiden name.

Defendant appealed to this Court. This Court reversed, finding that the trial court erred in limiting the taking of further testimony and relying solely on the testimony from the referee's hearing, especially considering the staleness of the evidence. The case was reversed and remanded for a new hearing to be held by a different trial court. *Gillespie v Holtz*, unpublished opinion per curiam of the Court of Appeals (Docket Nos. 177740, 178668), issued March 12, 1996. On remand, the case was reassigned to Judge George E. Montgomery. On November 7, 1996, defendant moved to dismiss, again contending that the grandparents lacked standing to seek custody. The trial court denied the motion to dismiss, and subsequent applications for appeals to this Court and the Supreme Court were unavailing to defendant.

On September 17, 1997, the trial court ordered a Friend of the Court investigation and began a bench trial. On September 26, 1997, the Friend of the Court investigator recommended that physical and legal custody be awarded to the grandparents. The bench trial ended on December 8, 1997, and in an opinion and order entered June 25, 1998, the trial court awarded physical custody of the children to

defendant. The trial court also entered a stay of proceedings pending appeal on July 13, 1998. The grandparents now appeal.[1]

We first address the various standards of review involved in this case, which are established by MCL 722.28; MSA 25.312(8):

> To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.

Further, contrary to defendant's argument, we do not find that the trial court erred in ruling that an established custodial environment existed with the grandparents and that the burden of persuasion was on defendant to prove by a preponderance of the evidence that it was in the children's best interests to change custody. In this regard, defendant contends that the establishment of a custodial environment becomes a factor only when considering a petition for change of custody, but not when deciding an original custody action as in this case. We conclude that the trial court did not commit clear legal error in determining that it was necessary to make a finding on the existence of an established custodial environment on the authority of *Bowers v Bowers*, 190 Mich App 51, 53-54; 475 NW2d 394 (1991):

> A panel of this Court recently held that in original actions involving the determination of custody of children, as opposed to actions for modification or amendment of previous judgments regarding custody, the question whether an established custodial environment existed is irrelevant. *Helms v Helms*, 185 Mich App 680, 682; 462 NW2d 812 (1990). However, prior decisions of this Court have held that in original actions in which a temporary custody order exists, the trial court has the responsibility of making a definite finding regarding the issue of custodial environment. See, e.g., *DeVries v DeVries*, 163 Mich App 266, 271; 413 NW2d 764 (1987); *Schwiesow v Schwiesow*, 159 Mich App 548, 557; 406 NW2d 878 (1987); *Curless v Curless*, 137 Mich App 673, 676-677; 357 NW2d 921 (1984). In light of the circumstances of the instant case, in which there was a very substantial period of time between the initial separation and the time of trial, we find the better-reasoned approach to be that of the *DeVries* line of cases. We believe that a custody arrangement that is the result of a stipulation of the parties is analogous, in terms of intent and effect, to a temporary custody order. In both instances the court is required to look into the actual circumstances of the case to determine whether an established custodial environment existed. *DeVries, supra; Curless, supra.*

The present case is similar to *Bowers* because prior court orders gave the grandparents temporary custody and the time between the first order and the bench trial in this case was over six years. Accordingly, the trial court did not commit a clear legal error in deciding that it must make a finding on whether an established custodial environment existed.

Next, we conclude that the trial court's finding that an established custodial environment existed with the grandparents was not against the great weight of the evidence. Whether an established custodial environment exists is a question of fact for the trial court to resolve on the basis of statutory criteria. *Hayes v Hayes*, 209 Mich App 385, 387-388; 532 NW2d 190 (1995). The trial court found specifically that the children had resided with the grandparents for over seven years, that the grandparents provided the children with daily care and maintenance, and that an established custodial environment existed with the grandparents. The trial court's finding in this regard is fully supported by the evidence presented at trial. Contrary to defendant's contention, the trial court did not "presume" an established custodial environment simply because the children lived with the grandparents. The opinion makes clear that the trial court also found that the grandparents provided the children with daily care and maintenance. Moreover, any uncertainty in the upcoming custody trial did not preclude a finding of an established custodial environment because there were not repeated custody changes in the past. The children had lived with the grandparents for over seven consecutive years. Cf. *Hayes, supra,* p 388 ("Where there are repeated changes in physical custody and there is uncertainty created by an upcoming custody trial, a previously established custodial environment is destroyed and the establishment of a new one is precluded.").

Here, the trial court's factual finding that an established custodial environment existed with the grandparents does not clearly preponderate in the opposite direction, therefore, the finding is not against the great weight of the evidence.

Next, we address defendant's burden of persuasion. In the present case, there are two relevant statutes containing conflicting burdens. On the one hand, MCL 722.25; MSA 25.312(5) creates a presumption that a child's best interest is served by awarding custody to the parent when there is a custody dispute between the parent and a third party, unless the contrary is shown by clear and convincing evidence. On the other hand, MCL 722.27(1)(c); MSA 25.317(1)(c) provides that a court is not to change the established custodial environment unless there is clear and convincing evidence that it is in the best interest of the child to do so. This Court resolved this conflict in *Rummelt v Anderson,* 196 Mich App 491, 496; 493 NW2d 434 (1992), by holding that the existence of these two presumptions reduces the burden of persuasion to a preponderance of the evidence and that the burden of persuasion rests with the parent challenging the established custodial environment. Accordingly, the trial court did not clearly err in applying *Rummelt* and ruling that the burden of persuasion was on defendant to prove by a preponderance of the evidence that it was in the children's best interests to change custody.

A trial court determines the best interests of the children by weighing the twelve statutory factors set forth in MCL 722.23; MSA 25.312(3). *Hilliard v Schmidt,* 231 Mich App 316, 321; 586 NW2d 263 (1998). A trial court's findings with regard to each of the factors is subject to the great weight of the evidence standard and should be affirmed unless the evidence clearly preponderates in the opposite direction. *Id.*, citing *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994). In this case, the trial court found that the parties were equal with regard to four of the factors, the grandparents prevailed on three of the factors, and defendant prevailed on four of the factors (and the children's preference was not stated on the record). The trial court ultimately concluded that defendant satisfied

her burden of persuasion by a preponderance of the evidence and that it was in the best interests of the children to change physical custody to defendant. This dispositional ruling is reviewed for an abuse of discretion. *Fletcher, supra*, p 880.

The grandparents challenge six of the trial court's findings: factors (e), (f), (g), (h), (j), and (l). The remaining factors are unchallenged by the parties. The trial court found factor e (the permanence, as a family unit, of the existing or proposed custodial homes) to be equal. Specifically, the trial court found:

> Mr. And Mrs. Gillespie have been married for 42 years and have raised six children. This demonstrates their ability to maintain a family unit. However, [defendant] testified that she has lived in her current apartment since January of 1997 and intends to renew her lease for at least another year. Before moving to that apartment, she lived with her father and stepmother for six years. Additionally, [defendant] is currently engaged to be married. Clearly, [defendant] has demonstrated an equal ability to maintain a stable household and family setting for the minor children. The Court finds this factor does not weigh in favor of either party.

The grandparents assert that the trial court gave undue emphasis to future events, rather than present reality, and that defendant's own testimony indicated a great deal of uncertainty regarding her future. However, we do not find the trial court's finding to clearly preponderate in the opposite direction. The trial court's finding clearly turns on its conclusion that defendant had shown an equal ability to maintain a stable household and family setting for the minor children. We note that the grandparents moved four times in ten years, while defendant lived with her parents for six years until she moved out on her own. Defendant's father corroborated defendant's testimony, and indicated that she could move back with them anytime if needed. Defendant had her own apartment and job, and the trial court clearly acknowledged the financial differences between the parties. Further, the trial court found defendant's future plans to be credible. There is nothing in the record to indicate that defendant did not have an equal ability to provide and maintain a stable household and family setting for the children, therefore, the trial court's finding is not against the great weight of the evidence.

The grandparents next challenge the trial court's finding that factor f (the moral fitness of the parties involved) weighed in favor of defendant. Specifically, the trial court stated:

> The Court recognizes allegations have been made by Mr. and Mrs. Gillespie that [defendant] is not morally fit. However, based upon its observation of [defendant] and in light of the testimony presented, the Court does not believe [defendant] lacks moral fitness. The Court has considered the testimony presented regarding [defendant's] separation of employment from Arbor Drug Store. Having observed the demeanor of the witness during the testimony, the Court accepts [defendant's] explanation. The Court questions the motivation of Mr. and Mrs. Gillespie and, because of their unfounded allegations, the Court finds this factor weighs in favor of [defendant].

Considering the trial court's superior ability to assess the witness' credibility, *Fletcher v Fletcher*, 229 Mich App 19, 25; 581 NW2d 11 (1998), we cannot conclude that the trial court's finding clearly preponderates in the opposite direction.

With regard to defendant's separation of employment from Arbor Drug Store, the trial court's decision to accept defendant's explanation that she did not intend to steal, and indeed misunderstood her prescription benefits and reimbursements, is not erroneous. Further, there was no evidence of unmarried cohabitation involving defendant and her fiance, and, in any event, unmarried cohabitation standing alone is not enough to constitute immorality. *Hilliard, supra*, p 324. Additionally, as to any alleged prior shoplifting committed by defendant, the trial court noted that defendant "had a shoplifting case," but that there was no conviction. Finally, the grandparents' claim that defendant gave deceptive testimony which establishes her moral unfitness, the trial court noted that defendant misrepresented the circumstances under which she left Arbor Drugs, however, this finding alone simply does not compel a conclusion that the trial court's finding of moral fitness clearly preponderates in the opposite direction.

We also cannot conclude that the trial court's finding of "unfounded allegations" by the grandparents means that the trial court found them to be morally unfit. The trial court did not state that the grandparents were morally unfit. Further, there were unfounded allegations of sexual abuse; allegations which were never proved even though they were pursued. Also, both of the grandparents claimed that defendant was morally unfit at trial, yet neither could give concrete examples when questioned. The trial court's finding with respect to factor f is not against the great weight of the evidence.

Factor g (the mental and physical health of the parties involved) was weighed in favor of defendant. The trial court specifically found:

> [Defendant] enjoys good physical health. . . . While Mr. Gillespie has not complained of any physical limitations, the same cannot be said for Mrs. Gillespie. Clearly, Mrs. Gillespie's health is poor. She has recently been hospitalized, is legally blind, suffers from high blood pressure and seizures and is medicating for a thyroid condition. In light of this, the Court finds this factor weighs in favor of [defendant].

The trial court's finding does not clearly preponderate in the opposite direction. Mrs. Gillespie's health problems were well documented, Mr. Gillespie's good health was duly noted, and defendant does not have the type of chronic health problems suffered by Mrs. Gillespie. The trial court's factual finding in this regard is not against the great weight of the evidence.

With regard to factor h (home, school, and community record of the children), the trial court weighed the parties equally. The trial court specifically found:

> Here, the testimony established the minor children had been enrolled in a Montessori school. However, it has come to the Court's attention, through the parties' letters to the Court, that the minor children are no longer enrolled in that school. The Court was concerned with the continuity of the education of the minor children. It is

> undisputed the minor children will be in different schools regardless of the outcome of the parties' custody dispute. Consequently, the Court finds this factor does not weigh in favor of either party.

We do not agree with the grandparent's contention that the trial court failed to fully address factor h. Our Supreme Court has noted that there is a degree of overlap between the best interest factors. *Ireland v Smith*, 451 Mich 457, 465; 547 NW2d 686 (1996). The home and community records were addressed by the trial court under factors d and e. The undisputed evidence established that the children had a good home, community, and school record. Additionally, it was not error for the trial court to consider the unchallenged fact that the children were no longer in the Montessori school because it was presented to him by a letter from defendant's counsel. Evidence at trial established that a school transfer was inevitable within the next year or so. Accordingly, the trial court's finding in this regard is not against the great weight of the evidence.

Regarding factor j (the willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the children and the other parent), the trial court stated it gave "careful consideration" to this factor and believed that factor j was "extremely important." The trial court specifically found:

> Here, the demeanor of Mr. and Mrs. Gillespie during their testimony established they have little regard for [defendant] and hold her in low esteem. Additionally, they have repeatedly interfered with [defendant's] efforts toward visitation. They also acknowledged [defendant] is only sporadically informed about such routine events as parent-teacher conferences, doctor appointments, Girl Scout events and the like. Mr. Gillespie repeatedly testified [defendant] did not inquire about such events nor did she inquire about the children's report cards. While this may be true, it is also true that Mr. and Mrs. Gillespie made little effort to share such information with [defendant].
>
> From their testimony, the Court finds it would be very unlikely Mr. and Mrs. Gillespie could either foster or encourage a close relationship between the minor children and their mother. The testimony of [defendant] did not raise such concerns for the Court. For these reasons, the Court finds this factor weighs in favor of [defendant].

Giving due deference to the trial court's superior ability to judge the credibility and demeanor of the witnesses, *Fletcher, supra*, p 25, we cannot conclude that the trial court's findings clearly preponderate in the opposite direction. Further, testimony of the grandparents supports the trial court's conclusion that they held defendant in low esteem.

Additionally, although the grandparents challenge the trial court's finding that they interfered with defendant's visitation, there is support in the record for this conclusion. In fact, this case presented a particularly complicated situation involving visitation because the grandparents as well as the parents were all competing for custody or visitation. Further, there were many disputes concerning visitation, with all parties accusing the other of obstructing visitation. Needless to say, based on the conflicting claims and evidence, we cannot conclude that the trial court's findings that the grandparents repeatedly

interfered with defendant's efforts toward visitation and that the grandparents would probably not foster or encourage a close relationship between defendant and the children are against the great weight of the evidence.

The final best interest factor challenged by the grandparents is factor l (any other factor considered by the court to be relevant to the child custody dispute), which the trial court found to weigh in favor of defendant. Specifically, the trial court stated:

> The Court has given careful consideration to the totality of the testimony presented to it during this de novo hearing. What stands out clearly from the testimony is that Mr. Gillespie has a controlling personality while Mrs. Gillespie is more docile. Indeed, it is clear to the Court that Mr. and Mrs. Gillespie have made it extremely difficult for [defendant] to maintain or foster a mother-child relationship with the minor children. [Defendant], on the other hand, has exhibited tenacity and perseverance throughout this custody proceeding which has lasted several years. The Court must commend [defendant's] mental strength which she has exhibited throughout these proceedings in spite of the obstacles placed in her way by Mr. and Mrs. Gillespie over the years. In light of the demonstrated personalities of the parties, the Court finds this factor weighs in favor of [defendant].

The trial court's finding does not clearly preponderate in the opposite direction. Although the trial court did not directly relate the parties' personalities to their ability to care for the children, the trial court apparently was attempting to relate the parties' personalities to fostering the parent-child relationship. Because the statutory factors relate to the person's fitness as a parent, *Fletcher, supra,* pp 886-887, and because there is a recognized degree of overlap between the factors, *Ireland, supra,* p 465, we find that the trial court did not commit clear legal error in considering this factor and weighing it in favor of defendant.

The trial court's ultimate dispositional ruling, to award physical custody to defendant, is reviewed for an abuse of discretion. The trial court found that factors b, c, and d weighed in favor of the grandparents, that factors f, g, j, and l weighed in favor of defendant, that factors a, e, h, and k were equal, and noted factor i (the children's preference which was not stated on the record). We conclude that the trial court did not abuse its discretion in finding that it was in the best interests of the children to award physical custody to defendant based on its findings under each of the statutory factors.[2]

At this juncture, we note that the trial court's opinion and order fails to include the question of legal custody. Previously, legal and physical custody had been awarded to the grandparents by orders of July 27, 1994 and August 26, 1994. However, this Court reversed the trial court's orders awarding legal and physical custody to the grandparents and remanded for a de novo custody hearing. As noted by this Court in the prior opinion, a trial court is required to conduct a de novo hearing on any matter that was the subject of a referee hearing upon proper request of a party and is required to proceed as if no prior determination regarding custody had been made to arrive at an independent decision. See *Marshall v Beal,* 158 Mich App 582, 591; 405 NW2d 101 (1986). Therefore, because the issues of physical and legal custody were being considered do novo by the trial court on remand, we conclude

that the trial court, in awarding physical custody to defendant, simply failed to include awarding legal custody to defendant as well. Accordingly, we remand to the trial court for the limited purpose of amending the order awarding physical custody to defendant to include legal custody so that physical and legal custody is vested with the mother.

Next, the grandparents challenge several of the trial court's evidentiary rulings during the custody hearing. The trial court's evidentiary rulings are reviewed for an abuse of discretion. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996).

The grandparents' first claim is that the trial court erred in ruling that the evidence at the custody hearing should be "fresh" and in only applying this rule of limitation to the grandparents, but not to defendant. The grandparents' argument is completely unsupported by the record. The trial court did not totally exclude evidence more than two years old at the hearing. Rather, the trial court stated:

> I want to stay as close to the newer material as we can. That's one of the reasons [the Court of Appeals] se[n]t this back, that we should look at fresh, you know, fresh matter.
>
> * * *
>
> I just want to emphasize that we want to stay with what is happening in the last year or two and we want to have it so if it does have to go back up, everything is fresh at least.

Thus, the record indicates that the trial court did not limit the evidence to that being only one or two years old.

The grandparents also contend that the trial court limited only them in focusing on the newer evidence while permitting defendant's counsel "to roam as far in the past as he chose." Specifically, the grandparents contend that the trial court eliminated their ability to present prior inconsistent statements, contradictions, and deception under oath of defendant contained in previous transcripts. The grandparents point to defendant's denial of an adulterous affair, concealment of her shoplifting, denial of her abusive language with the children, and "past medical problems" to show defendant's inconsistent statements. Although the grandparents contend that they wished to cross-examine defendant on these matters to establish a pattern of lying, they do not indicate how these topics relate to the best interests factors. Moreover, to the extent that these issues relate to defendant's credibility, the grandparents have identified no foundational basis for admitting this proffered evidence.

Having reviewed the transcript citations noted in the grandparents' brief, we conclude that the trial court's evidentiary rulings on these specific matters were not an abuse of discretion. The record reveals that the grandparents' attorney attempted to show past lies made by defendant at trial, but either did not establish foundational requirements, abandoned the questioning, or failed to phrase the questions within the parameters set forth by the trial court. Further, we emphasize that the grandparents have failed to indicate how this evidence even relates to the statutory best interest factors. Accordingly, the

trial court did not abuse its discretion in denying the grandparents' ability to challenge defendant's credibility on matter of importance through the use of sworn statements as argued by the grandparents.

We also find no error with regard to the trial court excluding the grandfather's testimony attempting to relate a statement made by Amber. The grandparents contend that the testimony attempted to be elicited was admissible under MRE 803(3) (then existing mental, emotional, or physical condition). However, the grandparents did not rely on this hearsay exception below, nor did they make an offer of proof as to the substance of Amber's statement. Thus, the issue is not properly preserved. MRE 103(a)(2).

Finally, we address defendant's request for costs and attorney fees. We deny sanctions to either party under MCR 7.216(C) because this appeal is not vexatious. Defendant, having prevailed in full, may tax costs under MCR 7.219.

We affirm the trial court's order awarding defendant physical custody and we remand to the trial court for it to amend its order to include awarding legal custody to defendant. We do not retain jurisdiction.

/s/ Jeffrey G. Collins
/s/ Kathleen Jansen

[1] We note at this juncture that defendant, in her appellate brief, argues that this appeal should be dismissed because intervening plaintiffs failed to timely file their appeal brief. Defendant also filed a motion to dismiss on the same basis and that motion was denied by this Court in an unpublished order dated December 18, 1998. Thus, we will not further address defendant's contention that the appeal should be dismissed due to intervening plaintiff's failure to timely file their appellate brief.

[2] The trial court stayed its order, thus, a change in custody has not yet occurred. We strongly urge the parties to ensure that the change in custody be conducted in such a manner that the best interests of the children be kept above all else.